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QUEBEC'S CONSTITUTIONAL VETO: THE LEGAL AND HISTORICAL CONTEXT



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QUEBEC'S CONSTITUTIONAL VETO:
THE LEGAL AND HISTORICAL CONTEXT

OVERVIEW

Throughout the first half century of Confederation, the issue of a veto on constitutional amendments was a moot point because legal control over amendments to the *Constitution Act, 1867* lay with the Parliament of Great Britain. After 1926, however, the Balfour Declaration on the independence of the colonies and the subsequent *Statute of Westminster, 1931*, forced the issue of creating an internal Canadian amending formula.

Nonetheless, from 1926 to 1981, there was little discussion of a Quebec veto, especially outside that province. The reason was simple. Legally, or constitutionally, the best argument for a Quebec veto appeared to be based on the premise that the agreement of every province was necessary to "patriate" or significantly alter the Constitution. This changed dramatically after the Supreme Court of Canada decided in 1981 that only "a substantial degree of provincial consent" was necessary.⁽¹⁾

In 1982, both the Quebec Court of Appeal and the Supreme Court of Canada held that Quebec had neither a legal nor a conventional right of veto. They agreed that the only argument for such a veto was based on the principle of the duality of the two founding peoples; this principle was inconsistent with the fact that, legally speaking, all the provinces are equal.

The issue, therefore, became whether Quebec could rely on a political tradition of a right to veto, and cause the Constitution to be

(1) *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at 905.

amended to reflect it. This, in turn, brought up the issue of whether there should be an "opting out" veto or an absolute veto. The former would allow a province to "opt out" of an amendment with financial compensation, or to veto the application of a particular amendment within its provincial boundaries. The latter, more general, veto would allow a province to hold up an amendment of general application until specific demands, possibly unrelated to the amendment at issue, were met.

THE SITUATION PRE-1980

In the absence of a clearly stated amending formula in the *British North America Act*, the notion that major changes to the Constitution required unanimous consent from the provincial and federal governments increasingly became the accepted "political" formula for changing the Constitution. Therefore, the belief, widely held in Quebec, that the province's government, the only one in Canada elected by a francophone majority, had a special claim to a veto over constitutional change, was rarely, if ever, expressed.

After the 1926 Balfour Declaration⁽²⁾ raised the possibility of political and constitutional independence for the various British colonies, including Canada, a series of negotiations culminated in the *Statute of Westminster, 1931*. The Canadian provinces were concerned, however, that this new level of Canadian independence might in some way give the federal government the power of amending the Constitution without the consent of the provinces. Accordingly, a Dominion-Provincial Conference was called in April 1931 at which the Premier of Quebec expressed the following view:

Mr. Taschereau (Quebec) - While stressing the importance of the present conference, Mr. Taschereau was not clear as to what was desired by it. Do we wish the *British North America Act* to be amended at the request of the Dominion only, without the consent of

(2) The Balfour Declaration was adopted at the Imperial Conference, which met in London from 19 October to 23 November 1926. The Declaration was a resolution defining Britain and the self-governing Dominions as "autonomous communities within the British Empire, equal in status."

the Provinces? Do we wish it to be amended by the Parliament of Canada? Quebec could not accept either of these suggestions. She was not prepared to agree that the *British North America Act* might be amended without the consent of the Provinces. This, he felt, was implied in the preamble and also in Section 4 of the Statute where no reference whatever was made to the provinces. Without such reference, he felt that the view was sanctioned that the *British North America Act* could be changed at the request of and with the consent of the Dominion alone.

Public opinion in the Province of Quebec would not support this draft Statute in that it gave the Parliament of the Dominion the power to alter the *British North America Act* without the assent of, or even consultation with, the provinces. The *British North America Act*, it should be remembered, was a contract with the Provinces. The Statute of Westminster might be of far-reaching importance and unless there were included in it a provision that the Provinces must give their consent to amendment of the *British North America Act*, he could not accept it. (3)

Throughout various constitutional discussions over the next 30 years, the provinces continued to maintain that unanimous provincial consent was required to patriate the Constitution and implement an amending formula; no such unanimous consent was forthcoming. In 1964, however, all provinces for the first time approved in principle the proposed Fulton-Favreau amending formula. Although the formula was complex, it provided for unanimous provincial consent for certain classes of subjects, including the entire range of the distribution of powers. The Favreau White Paper of 1965, "The Amendment of the Constitution of Canada," which described and endorsed the Fulton-Favreau formula, also summarized the history of attempts to agree upon an amending formula to that date. It described four general principles that had emerged from previous events, the fourth of which stated:

the Canadian Parliament will not request an amendment directly affecting federal-provincial relationships without prior consultation and agreement with the provinces. This principle did not emerge as early as others but since 1907, and particularly since 1930, has gained increasing recognition and acceptance. The

(3) *Report of Dominion Provincial Conference, 1931*, p. 12.

nature and the degree of provincial participation, however, have not lent themselves to easy definition. (4)

Later in the White Paper, the Honourable Guy Favreau (then Minister of Justice) noted: "in fact, in the 97 years that have elapsed since Confederation, no amendment has altered the powers of provincial legislatures under section 92 of the *British North America Act* without the consent of all the provinces." (5) The Fulton-Favreau formula was put aside in 1966 when Premier Lesage of Quebec withdrew his support.

In 1971, the provinces again agreed upon a formula, known as the Victoria Charter, for repatriating and amending the Constitution. This formula would, for the first time, have allowed all parts of the Constitution to be amended without unanimous provincial consent. Moreover, it was based on a regional formula, with vetoes for any province having, or having ever had, 25% of the population (Ontario and Quebec), and varying combinations of two eastern and two western provinces.

The new unanimity did not last long. Provinces were supposed to confirm their acceptance of the Charter by 28 June 1971. On 23 June 1971, the Government of Saskatchewan was defeated at an election, and the Government of Quebec indicated that it could not recommend the Charter to the Quebec National Assembly because of deficiencies in the clauses dealing with income security. By the time the federal government initiated the next round of constitutional proposals in 1978, two premiers had questioned the population qualification stipulated for the concurrence of Western Canada (two provinces having 50% of the population of the region); as well, Premier Bennett wanted British Columbia to be treated as a region entitled to a veto in its own right; and Premier Lougheed expressed a personal desire to return to the "unanimous consent" provisions put forth in the Fulton-Favreau formula.

(4) Hon. Guy Favreau, "The Amendment of the Constitution of Canada," White Paper, Department of Justice, Ottawa, 1965, p. 15.

(5) *Ibid.*, p. 46-7.

THE VIEW OF THE COURTS

In November 1981, the federal government and nine provinces agreed on the conditions for patriating the Constitution with an amending formula and a charter of rights. Quebec, however, objected strenuously.

The National Assembly passed a motion on 1 December 1981 that the province would agree to the *Constitution Act, 1982*, only on certain conditions. The Act would have to recognize the principle of equality of the founding peoples and the distinct character of Quebec, and include a veto or general opting-out right with full financial compensation, an exemption for Quebec from the provisions of section 23, and an abrogation of the Charter's mobility rights.

Quebec also initiated a court action, asking for recognition of its right of veto. In *Re: Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793, the Supreme Court of Canada summarized the two submissions of the Attorney-General of Quebec: the first claimed a conventional rule of unanimity and the second a conventional power of veto for Quebec based on the principle of duality, which has made Quebec a distinct society. The Supreme Court held that it had already clearly rejected a conventional rule of unanimity in the 1981 *Patriation Case*.

As for a specifically Quebec veto, the Supreme Court referred to its decision in 1981, wherein it adopted the following test for the existence of a constitutional convention:

We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by a rule; and thirdly, is there a reason for the rule? A single precedent with a good reason may be enough to establish the rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded themselves as bound by it.

The main purpose of constitution conventions is to ensure that the legal framework of the constitutions will be operated in accordance with generally accepted principles. It should be borne in mind, however, that conventional rules, although quite distinct from legal ones, are nevertheless to be distinguished from rules of morality, rules of expediency and subjective rules. (p. 802-803)

The Supreme Court concluded that counsel for Quebec had not asserted a single statement made by any representative of the federal authorities recognizing either explicitly or by necessary implication that Quebec had a conventional power of veto over certain types of constitutional amendments.

...Furthermore, a convention such as the one now asserted by Quebec would have to be recognized by other provinces. We have not been referred to and we are not aware of any statement by the actors in any of the other provinces acknowledging such a convention. (p. 815)

This followed closely the conclusion of the Quebec Court of Appeal in the same case (134 D.L.R. (3d) 719):

It is recognized that certain provinces are superior to others in land surface, population and resources, but legally speaking they are all on the same footing. Sections 91 and 92 of the *British North America Act, 1867* give the smaller provinces the same powers as the bigger provinces. The *British North America Act, 1867* recognizes, however, that Quebec is the only province whose civil law is based on that of France and where the majority of the population was and still is different from the majority of the other provinces with respect to language and religion. The distinctions made in law do not, however, confer upon the Quebec Legislature more extensive power than are conferred on the other legislatures. (p. 727)

These two Supreme Court of Canada decisions -- the *Patriation Case*, 1981, recognizing the convention that there need be only substantial provincial consent to amend the Constitution, and the *Quebec Veto Case*, 1982, rejecting Quebec's argument that it had a unique conventional right of veto -- are the legal conclusion to the discussion on the amending formula which began with the Balfour declaration. Although debate will continue as to whether Quebec has a political or historical right to a veto, whether any such right should be included in the Constitution, and in what form, the courts have clearly recognized the legal principle of provincial equality until further constitutional changes are implemented.

THE VIEW FROM INSIDE QUEBEC

Regardless of the court decisions, however, Quebec's claim to a constitutional veto has always been implicitly maintained within the province by both the political structures and academic commentary. Only after the enactment of the *Constitution Act, 1982*, which did not provide a veto for Quebec, did the demand for such a veto, or its restoration, become explicit. Although there have been disagreements, often influenced by purely political considerations, over the form this veto should take, the claim for a Quebec veto and the set of justifications upon which this claim rests are almost unanimously subscribed to within the province. The idea that the province's government should be able to exercise a constitutional veto is firmly rooted in Quebec's own interpretation of the structure of Confederation itself; however, this interpretation is generally at odds with that of the rest of the country. In essence, the view inside Quebec has always been that Confederation was both an arrangement between the original four provinces and, more significantly, a pact between the two founding peoples. The pervasiveness of the "two founding nations" concept is illustrated by a statement of former Prime Minister Pierre Trudeau in 1967:

...the Act of 1867 was a law of the Imperial Parliament, but a law based on an agreement between [the two] federating parties ["deux parties qui se fédéraient"] and consequently a law which can best be understood and interpreted (and eventually amended) by referring to the spirit of that agreement. (6)

Quebec provincial governments, particularly in the post-war period, have added to this interpretation the argument that Quebec, the only political entity in Canada with a majority francophone population, is the "cornerstone" of French Canada. If Confederation is a pact between two peoples, it follows that the pact should be altered only by mutual consent. The consent of Quebec, the voice of one of the two founding

(6) Pierre Elliott Trudeau, *Federalism and the French Canadians*, Macmillan of Canada, Toronto, 1968, p. 132.

peoples, is a necessary condition for constitutional amendment, according to this view.

During the early post-war period, however, the question of an amending formula or a veto for Quebec was not pressing. As long as unanimous consent remained the accepted precondition for constitutional change, there was no need to argue in favour of a veto for Quebec based on its special role within Confederation. As Senator Gérald Beaudoin indicated in 1979:

After 1964, it seems that Quebec, sure of being able to protect what it already had, was hoping to gain more from the separation of powers and was thus putting on one side the question of the amending formula and was concentrating instead on a renewed division of powers. All the governments of Quebec after that of Jean Lesage followed suit. In Victoria, in 1971, the amending formula was not at the forefront of the discussions. (7) [unofficial translation]

Even though Quebec continued to subscribe to the more general theory that the consent of all provinces was required for patriation and a new amending formula, successive Quebec governments moved steadily towards the formal position that Quebec had a special status within Confederation, including a unique claim on a constitutional veto.

In 1939, the government of Maurice Duplessis maintained that "the federal pact by participating in the nature of conventions, can neither be amended nor modified without the agreement of all the parties, i.e., of all the provinces." In 1944, the second Duplessis government reiterated the "compact theory" that the Constitution could not be amended without the consent of all contracting parties, "or at least without the consent of the four pioneer provinces." (8)

By the early 1960s, however, the Lesage government, while still affirming the need for provincial participation generally, was

(7) Gérald Beaudoin, *Essai sur la Constitution*, Ottawa, 1979, p. 356-357.

(8) "Quebec's Traditional Constitutional Positions, 1936-1990: Working Paper," Secrétariat aux Affaires intergouvernementales canadiennes, Direction des Politiques institutionnelles et constitutionnelles, Ministère du Conseil exécutif, November 1991, p. 3, 7.

speaking of a Quebec veto that appeared different in nature from the general provincial veto:

To defend its particular status, Quebec must have a veto over any important constitutional change that could threaten its powers ... Quebec fears that the Fulton-Favreau formula would authorize any province to prevent an increase in the powers of another province. It goes without saying that should this interpretation prevail, it could become very difficult for our constitutional system to evolve as Quebec would like. (9)

The fact that Quebec was able to block important attempts to change the Constitution (as in 1965 when Premier Lesage vetoed the Fulton-Favreau amending formula, and in 1971 when Premier Bourassa refused to agree to the Victoria Charter) was subsequently interpreted within Quebec as a confirmation of the existence of that province's constitutional veto.

The situation changed dramatically, however, in the aftermath of the 1980 referendum in Quebec. When the federal government moved unilaterally to repatriate the Constitution, the recently re-elected Parti Québécois government of Quebec sought to block the move by joining an alliance of seven other provinces. In joining this common front of provincial governments, Quebec endorsed an amending formula that, rather than stipulating unanimity, included a provision for opting out from changes made to the Constitution with reasonable compensation. When Ottawa and the dissenting provinces subsequently reached a compromise on patriation that allowed for opting-out, but which had much narrower provisions for compensation, Quebec declined to participate.

Thus, the notion that Quebec exercised a constitutional veto based on its unique position in Confederation received a shock. The Constitution was patriated in an amended form over the objections of Quebec, and did not accord the province a veto over future constitutional change. It was only after this presumed right of veto had been swept aside in the process of achieving the *Constitution Act, 1982* and failed to be

(9) *Ibid.*, p. 13-14.

mentioned in the final document, that some in the province began to demand what they referred to as Quebec's historic right to veto.

In his memoirs, René Levesque explains why he had agreed to accept "opting out with compensation" instead of the more traditional veto:

But Quebec would be deprived of its right of veto.* I should perhaps admit that this old obsession has never turned me on. A veto can be an obstacle to development as much as an instrument of defence. If Quebec had it, Ontario and perhaps other provinces would surely ask for it, too. And, as in Victoria in 1971, it would be possible to block change and in protecting oneself paralyse others, leaving everyone way ahead ... or behind.

On the other hand, the right to opt out, which we had learned to use in the sixties - the best example being the creation of the Caisse de dépôt - is in my view a much superior weapon, at one and the same time more flexible and more dynamic. You wish to take this or that path we are not ready to follow? Very well, my friends, go ahead. But without us. From stage to stage, I repeat, we could create something very like a country in that fashion.

* On this subject, as everyone remembers, the Supreme Court ruled in December 1982 that, in its opinion, the right of veto did not exist and had never been more than a fiction. But no matter how hard one might try to revive it politically, I can't see the Anglophone provinces, and even less the federal government, renouncing this judgement, which is right down their alley. At all events, going down this path does not appear to me to be the most promising direction for our political future. (10)

Quebec's initial willingness to drop unanimity, and accept an amending formula that would have allowed dissenting provinces to opt out with compensation, provoked some argument in the province. During the 1985 provincial election campaign, the Liberal Party accused the Parti Québécois of having abandoned Quebec's traditional demand for a constitutional veto. Gil Rémillard, now Quebec's Minister responsible for Canadian Intergovernmental Affairs, suggested that by having agreed to the first amending

(10) René Levesque, *Memoirs*, Editions Québec/Amérique, Montreal, 1985, p. 325-6.

formula proposed by the other seven provinces in 1981, Quebec had signed a document which would have had:

...grave implications, because it stated that all the provinces are equal. This was equivalent to saying that Quebec had given up the right to veto which, until then, it had always claimed. Moreover, Quebec's signature implied that the government of that province was, at least in the formal sense, renouncing its distinctness... (11) [unofficial translation]

In its campaign, the Liberal Party promised that it would fight to restore this lost "veto right." The claim that the PQ had jettisoned this right to veto continues to be a favoured weapon in the Quebec Liberal Party's arsenal and both Gil Rémillard and Premier Bourassa seldom pass up the opportunity to make use of it. The Party's 1985 policy statement, *Mastering Our Future*, declared that a veto on constitutional matters was "a right which Quebec has exercised in the past." In the strictest terms, this is true; however, Quebec had only exercised this right within the context of the need for unanimity among all the provinces. Writing at about the same time, Gil Rémillard stated that, although it was not recognized in the Constitution, Quebec had held a veto that existed within a political dimension. "Quebec's right to veto has never existed constitutionally. What did exist before patriation, however, was a political pressure that obliged Ottawa and the other provinces to respect Quebec's point of view" (unofficial translation). (12)

Claude Morin, Premier Lévesque's principal constitutional adviser at the time the decision to join the common front with the other provinces was made in April 1981, makes the opposite case. Morin's argument, which highlights the difference between the "opting out" veto and the absolute veto, questions the utility of the constitutional veto, which Quebec has traditionally claimed. He claims that the absolute veto, which

(11) Gil Rémillard, *Le fédéralisme canadien*, Tome II: *Le repatriement de la constitution?*, Montreal, 1985, p. 128.

(12) *Ibid.*, p. 431.

is negative in the sense that it provides its user with the power to prevent constitutional change, is more a political symbol surrounded by unquestioned verities than a truly effective guarantee of Quebec's rights. Furthermore, he argues that to use such a veto can incur a heavy penalty. For example, the other provinces might perceive Quebec as standing in the way of desired constitutional adjustments and take retaliatory measures. Thus, the veto would tend to be applied only when major amendments were being proposed. Smaller changes with equally adverse implications for Quebec's interests might slip through, because blocking them would not seem to be worth the costs involved. It is from this perspective that Morin advocates the more positive opting-out approach which would allow a province such as Quebec to exempt itself from certain constitutional changes and to receive compensation, while the other provinces could proceed.

The present Bourassa government, prior to the failure of the Meech Lake Accord, had taken a two-pronged approach to a Quebec veto. It had argued both that Quebec should be given the constitutional right to block changes to federal institutions and the creation of new provinces, and that there should also be financial compensation for opting out. Although a Bourassa government might be satisfied with just the right to opt out with compensation, the demand for a more universal veto is probably too politically attractive to be dispensed with. As the party argued in its 1985 policy statement entitled *Mastering Our Future*, "...a universal Quebec veto on all matters of a constitutional nature ... offers the most advantages. It is a much better reflection of Quebec's history, and corresponds more closely to our vision of federalism." (13)

Overall, it is safe to conclude that, regardless of political divergences over the form that a constitutional veto for Quebec should take, there is a strong consensus in that province that: 1) Quebec has a right to a constitutional veto; 2) Quebec has historically and consistently claimed such a veto; and 3) Quebec's right to a veto is based on its special role within Confederation as the representative of one of two founding peoples.

(13) Liberal Party of Quebec, *Mastering Our Future*, Montreal, 1985, p. 55.



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